NO. 3641

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,
Appellant.

vs.

R. A. W. KRAMPITZ,
Appellee.

BRIEF OF APPELLEE

Upon Appeal From The District Court For The Territory of Alaska, Third Division.

J. L. REED,
Attorney for Appellee.

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STATEMENT OF THE CASE

A statement of the case by appellee is made necessary as appellant has not served a brief within the time required by the rules.

The appellee, R. A. W. Krampitz, on the 19th day of March, 1920, commenced an action in the dis-

trict court against Free Gold Mining Company, a corporation, for himself and certain other lien claimants to foreclose their liens against the property now in controversy. The only part of the record in the lien foreclosure proceeding made a part of the record in the appeal of this cause is the Judgment and Decree (R. 95) entered April 17th, 1920. The property in controversy was sold to appellee at Marshal's sales May 1st and June 1st, 1920. Thereafter and not until the 19th day of October, 1920, did the Alaska Homestake Mining Company intervene or raise any question as to their ownership or interest in the property in question, at which time this equitable action was commenced. The trial court entered an order setting aside the judgment in the lien foreclosure suit, Cause No. 1029, for the purpose of determining the merits of the case raised by the issues in this Cause No. 1060. A hearing resulted in a judgment in favor of appellee and dismissing plaintiff's action, from which judgment plaintiff brings this appeal.

ARGUMENT AND AUTHORITIES.

As appellant and appellee were plaintiff and defendant in the trial court the latter terms will be adhered to in this brief.

Assignment No. 1. It is manifest that the Court

did not err in denying plaintiff's motion to strike defendant's affirmative defenses, the same being within the issues, the subject matter of the action and the rights of defendant in relation thereto.

Assignments 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14 and 15, relate to the admissibility of certain evidence introduced at the hearing and these assignments have been grouped because the underlying reasons governing the admissibility of this evidence are applicable to each and all.

The plaintiff's cause of action, its right to have the judgment in the lien foreclosure suit set aside, by reason of its alleged ownership and interest in the property involved is predicated upon the lease or leases, the posting of notices of non-liability for wages and the forfeiture provisions of the lease, all of which are set forth in the complaint. As the notices of non-liability for wages refer only to plaintiff's ownership or interest in the mining claims, Camp Bird No. 1 and 2, and no other notices having been posted, it is essential to plaintiff's case that the machinery be held to be real estate. Defendant demurred to plaintiff's complaint (R. 28) upon the ground "That it appears upon the face thereof that said complaint does not state facts sufficient to constitute a cause of action." Hence, before the question arises whether

the property is realty or personalty, the *right* of plaintiff to maintain this proceeding under the facts stated in its complaint *must first be established.* This goes back to the question, under the facts admitted, could plaintiff avoid miner's liens against any interest it might have in the property involved by posting of notices of non-liability for wages. The leases are set forth and made a part of the complaint, and it is alleged that they were assigned to Free Gold Mining Company, and that defendant's claims of lien were for wages or labor expressly stated to have been performed subsequent to the posting of the notice by plaintiff of non-liability for labor employed by the lessees or their assignee, (R. 5).

AGENCY.

Do the facts stated in the complaint create the relation of principal and agent between plaintiff and Free Gold Mining Company so as to preclude plaintiff from maintaining this proceeding? If the leases create agency, then the acts and declarations of the manager of Free Gold Mining Company were admissible in evidence against the Alaska Homestake Mining Company. The complaint affirmatively shows that the work of the lien claimants was done at the instance of the Alaska Homestake Mining Company within the intent of the law.

The miner's lien law of Alaska, entitled "An Act to Provide for Liens of Laborers and Miners etc.," approved April 21, 1915, provides in part:

> Section 5. "All work and labor performed in, on or upon a mine or mining claim at the instance of any person in privity with, or having the right of possession, or privilege of working or mining thereon from the owner or his authorized agent, in prospecting * * * * * shall be deemed to have been done at the instance of the owner of the mine or mining claim, and such owners interests therein shall be subject to any lien filed in accordance with the provisions of this Act, unless such owner shall, within ten days after he shall have obtained knowledge of such work or labor being performed, give notice that he will not be responsible for the same, by posting notices in writing to that effect," etc.

In construing similar provisions of law in the case of,

Arctic Lumber Co. v. Borden 211 Fed. 54.

Gilbert, Circuit Judge said, "Assuming as found by the court below, that within three days from the commencement of the building Borden posted a notice in a conspicuous place thereon that he would not be responsible for any material or work furnished in the construction thereof, the question remains whether he thereby defeated the appellant's claim of lien," and further said "The provisions of section 265 are for the

benefit and protection of the owner in cases where work is not done and material is not furnished at his instance, *or at the instance of his agent*. It is not the intention of the law, nor is it the purport thereof, that when in fact the work is done, and the material is furnished at the owner's instance, he may prevent a lien upon his property by posting the notice referred to in that section."

And held, that where a lease authorizes the lessee to make improvements by deducting the cost from the rent, or where part of the consideration for the lease is the making of improvements which becomes a part of the realty or revert to the lessor, a mechanic's lien may attach for work done or materials furnished pursuant to a contract with the lessee. The Court approves the following rule and says, "It is a general rule that where a lease contains a provision authorizing the lessee to make improvements, by 'deducting the cost thereof from the rent, or where the consideration of the lease is the making by the lessee of improvements which become a part of the realty, or that the improvements made by the lessee shall revert to the lessor, a mechanic's lien may attach to the property for work done or materials furnished, pursuant to a contract with the lessee.' " 27 Cyc. 58 and cases cited.

In *Meyers v. J. A. Strowbridge Estate Co.* (Or) 160 Pac. 135.

The court said "By section 7416 L. O. L. the right to a lien upon a building is conditioned up-

on the labor or material for which a lien is claimed being furnished 'at the instance of the owner of the building * * * * or his agent.' Where it is provided in a lease as a part of the consideration thereof that the lessee shall make permanent improvements which shall revert to and become the property of the lessor at the termination of the lease, the lessor thereby *causes the improvement to be made* and the lessee becomes the *agent* of the lessor in the making of such improvements", and

Held, That under L. O. L. Sec. 7419, providing that every building constructed on land with the knowledge of the owner shall be held to have been constructed at his instance and shall be subject to liens, unless within three days after knowledge of such construction he posts a notice that he will not be responsible therefor, premises leased for a term and under which the lessee becomes the owner's agent and contractor for its improvement were subject to the liens of subcontractors, *notwithstanding the posting of such notice.*

The facts of this case are stronger, if anything, than those of the Arctic Lumber Company case in establishing agency between lessor and lessee and thereby creating a conclusive presumption of law against any claim or title or interest in the property by the lessor. The lien claimants were employed by Free Gold Mining Company who under the leases, were in privity with and having the right of poses-

sion and privilege of working and mining thereon from the owner, therefore, if agency was created a conclusive presumption arises that the work was done at the instance of the owner and he could not come into a court of equity with clean hands asserting ownership of the property involved.

> The leases provide in part; (R. 17) "and after the 1st day of July, 1918, until the date of expiration of this lease the parties of the second part covenant and agree that they will keep at least six men steadily at work upon said mining claims * * * * that cessation of work * * * * for a period of thirty days shall work a forfeiture of this lease and the mining premises or mine described herein shall immediately revert to the party of the first part." and (R. 19) "agree to keep the said mine and all and every portion thereof, free and clear of and from all liens arising from labor performed." (R. 13) "It is further agreed and the parties of the second part hereby agree to have a compressor on said mining claims on or before the first day of July 1918, and that a mill capable of handling not less than ten tons of ore per day shall be placed on said mining claims on or before the 1st day of September, 1918.
>
> (R.12) "It is further agreed that all improvements, machinery, tools and other equipment placed on said property by the parties of the second part during any of the time which this lease

has to run shall at the expiration of the term of the same be the property of the party of the first part and shall not be removed from said property," and also provides that all improvements, machinery, tools and other equipment placed on said property by the party of the second part, shall be the property of the party of the first part at the expiration of the lease or a forfeiture thereof.

Thus is will be noticed that under the terms of the leases that the lessor *required* the lessee to "keep at least six men steadily at work upon said mining claims," (R. 5) and under this *requirement* defendant Krampitz and the other lien claimants may be said to have performed labor. When they quit work and filed their liens plaintiff's right to declare a forfeiture arose therefrom.

Notice declaring a forfeiture was not given.

Q. There was no notice of forfeiture served upon you as manager of the company by Alaska Homestake Mining Company?

A. No. (R. 69).

The leases also *required* a compressor and a mill capable of handling not less than ten tons of ore per day to be placed on said mining claims by lessee.

OWNERSHIP

For the purposes of the miner's lien law of Alaska, agency once established between lessor and lessee, the Free Gold Mining Company became the owner of the property in dispute;

In *Webster City Steel R. Co. v. Chamberlain et al* 115 N. W. 504,

Bishop J. said "The statute gives a lien to every person who shall furnish any materials or machinery for any building, erection or other improvement upon land. An essential predicate for a lien is a contract with the owner or his agent, under which the materials or machinery are to be furnished *Code* Sec. 3089. An owner within the meaning of the statute is any person for whose use or benefit any building, erection, or other improvement is made *Code* Sec. 3096."

"We have then the question on plaintiff's appeal whether A. W. Chamberlain, a tenant in possession, who constructed an improvement for his own use and benefit—and this with full knowledge and approval of his landlord—comes within the statutory definition of an owner. If he does, then this lien should be allowed as against the improvement into which the materials purchased by him entered. If he does not—and there being no claim of contract with any other person—there must be a denial of the right to a lien. On this point, we think the case is ruled by *Estabrook v. Riley* 46 N. W. 1072, 10 L. R. A. 33."

And it was held that he was such an owner as the law contemplates for making contrats to be followed by mechanic's lien.

The judgment in the lien foreclosure suit Cause No. 1029 in part reads as follows:

"It is Ordered, Adjudged and Decreed as follows, to wit:

That by reason of the work and labor performed and done by plaintiff and his assignors upon, in and about said mills, machines and machinery and upon said dump or mass of mineral bearing earth, ore, rock and gold in the production thereof, hereinafter more particularly described, at the instance of the defendant, the owner and reputed owner thereof, the said plaintiff now has a first valid lien upon said mills, machines, etc" (R. 96).

The record shows that the plaintiffff had both actual and constructive knowledge of defendant's lien foreclosure suit in which the judgment was entered April 17th, 1920, yet awaited until October 19, 1920 to bring this proceeding. Plaintiff's position now is the same as though it had intervened or had been made a party defendant in that suit.

In *Pagnacco v. Faber et al* 73 Atl. 172

It was held: It is incumbent upon a person owning premises, or having an interest therein

to assert his rights as such owner, or his equity arising out of such ownership, in a mechanic's lien foreclosure; and having failed to do so, he is concluded by the judgment for plaintiff.

In *S. H. Harmon Lumber Co. v. Brown* 131 Pac. 368.

It was held, that an owner of a lot was chargeable with constructive notice of the construction of lienable improvements made by a lessee where the lease *required* such improvemenst to be made, as was another lessor under a lease which did not require, but which contemplated the making of such improvements.

Waring et al v. Bass 80 So. 514.

It was held: The word privity as used in section 2210 *General Statutes of Florida* 1906, providing for the acquisition of liens by persons in privity with the owner, against the latter's real property, is not employed in the technical sense of the common law, but implies special knowledge showing active consent or concurrence (quoting Words and Phrases 1st Series—Privity).

Weiss & Jennett Min. Co. v. Rossi 198 S. W. 424.

The court said: "The principle is laid down that a lessor by binding his lessee to make improvements of substantial benefit upon the demised premises, thereby constitutes the lessee his *agent,* within the meaning of the Mechanic's Lien Law, and may thereby subject his property to a

lien for labor performed and materials furnished in making such improvements under a contract with the lessee. That obligation does not spring from the mere relation of landlord and tenant but from a contract express or implied between the lessor and lessee."

Harris et al v. Graham et al 111 S. W. 984.

It was held that, where a husband contracts for the improvement of his own wife's land with one believing the husband to be the owner, and the wife knowing such fact, permits the work to be done without disclosing her ownership, she will be estopped to set up her title in defense of an action to enforce a contractor's lien.

Ehrhardt Bros. D. Co. v. Columbia Candy Co. 186 S. W. 1113.

Held: Agency of the tenant to contract for improvements, authorizing a mechanic's lien need not be express, but may be implied from the owner's conduct and asquiesence and from circumstances estopping him to deny the agency.

PERSONAL PROPERTY

Assignments 7, 17, 18, 19, 20 and 21 relate, to a ruling of the Court and to the findings of fact that the machinery and gold bullion to be personal property within the meaning and intent of the Miner's Lien Law of Alaska, 1915. This law does not enlarge either class of property. It leaves the decisions of the courts as to what constitutes realty and personalty and the tests to be applied, the same after, as before its adoption.

Section 13 *Session Laws of Alaska* 1915, p. 28 provides

> "And the term "mill" or "machine" shall be construed to include any hoist, engine, and boiler, roasting or reduction works, stamp, roller or other mill, concentrator, conveyor, elevator, or other machinery used in and about a mine in digging, hoisting, conveying, washing, or blocking out mineral contents thereof, or reducing same to commercial value, while the said mill or machinery is at the mine or on the mining claim and used in connection with the operation thereof and which are not fixtures and included in the term "mine" as hereinabove defined."

Section 5 p. 33 requires notices of non-liability to be posted "on such dredge, steam shovel, mill or machine," whereas the latter part of said section page 34, reads "All labor performed in any

manner directly aiding or assisting in the production of dump or mass of gold bearing sands, gravels, earth, ore or rock, shall be deemed to to have been performed at the instance of the owner thereof, and the same shall be prior and perferred over any deed, mortgage, bill of sale, attachment of other claim whether made or given prior to such labor or not."

It was the evident intent of the law, that where the lessee employs labor "in the production of a dump or mass of gold bearing sands," etc. that the labor should have a 100 per cent lien rather than and 87 1-2 per cent lien as claimed in behalf of plaintiff, and this, without any means being suggested of escaping liability.

Many of the items covered by the lien (R. 7. & 8.) are described in the exact language of the law as being within the definition of "mill" or "machine" to wit; mills, engine, concentrator, *hoist* engine and *gas* engine.

Henkle et al v. Davis et al 15 Or. 610.

The court said "To give a chattel the character of a fixture, and to render it immovable, three things are necessary '(1) Actual annexation to the realty or some appurtenant thereto (2) application to the purpose or use to which that part of the realty with which it is connected is appropriated; and (3) the intention of the parties

making the annexation to make a permanent accession to the freehold."

In the case now before the Court there was an appreciable but not actual annexation of the machinery to the freehold. Wm. Quitch, the manager of Free Gold Mining Company believed that the machinery, of which five-sixth had been purchased by Free Gold Mining Company was personalty and subject to labor liens. He conveyed his impressions to the men who worked on the ground, they relied upon his assertions of ownership and lienability of the machinery. He states that it was impossible to get men to work without this protection. (R. 60) The annexation of the machinery to the realty was so slight and incomplete that all the men who saw conditions as they existed were misled inclusive of the manager of the Free Gold Mining Company, if the finding of fact by the lower court that it was personalty, was an error. It was second hand machinery, (R. 62); it had been mostly brought from another mine near by; it could be removed without imparing the buildings, without damaging the realty and without injury to the machinery by removing the bolts and nuts, while in some instances even this was unnecessary.

In re *Seward Dredging Company* 242 Fed. 225.

The court said "We hold as a fact that the combustion engine, and a fortiori the other articles, were easily removable by (at the most) loosening certain bolts, and that such removal would neither have injured nor destroyed the realty nor destroyed nor necessarily injured the chattels. This being the case the Oregon decisions do not impose upon them the character of a realty. *Herchberger v. Johnson* 37 Or at 111. This holding is consistent with the only local decision on the subject *Mineral etc. Co. v. Ramsay* 4 Alaska 734. It is perhaps true that the trend of opinion in the Oregon decision is more strongly against the removal or severability of chattels than is warranted by *Holt v. Henley* 232 U. S. 637 and *Detroit etc. C. v. Sisterville* 233 U. S. 712 but they go far enough for this case."

Albertson v. Elk Creek Mining Co. 39 Or. 552.

There is practically no dispute as to the facts of this case. Wm. Quitch, president and manger of Free Gold Mining Company and also a stockholder in the Alaska Homestake Mining Company testified (R.60)

Q. Did you try to get Mr. Holland to go to work without claiming a lien on the ground or upon the machinery? Did you have a paper drawn up so if he signed it he would go to work without claiming any lien rights on the property?

A. No.

Q. You did not?

A. No. I did have a paper drawn up by Mr. Dimond when I first got to be manager of the company. I presented it to Herman Hill, possibly, somebody else and everybody that seen it would simply turn away and say, "I don't need work that bad," so I wouldn't present it to anybody else.

And further testifying (R. 62)

Q. And all the rest of it was bought and paid for by the Free Gold Mining Company and put on the ground?

A. Except the forge.

Q. The Court: What was the proportion of the property that was put on, would it be a quarter or what—the property that was put on there?

A. One-sixth would be more nearly it.

Q. Partly omitted—was that second-handed machinery, or was it new machinery.

A. It was for the most part second-handed machinery.

Q. As to the character of the buildings down there, aren't they all single-board buildings, temporary structures, with corrugated iron roofs—single-board buildings?

A. Yes, sir.

Q. All of this machinery, the heavy machin-

ery, to disconnect it from anything that it was attached to, all it would require would be to take out a bolt or nut?

A. Yes. (R. 62).

And further testifying, (R.63).

Q. Now, in regard to taking that machinery out—could that machinery be taken apart and removed without injury to the buildings?

A. Yes, sir.

And further testifying as to his belief in the ownership and lienability of the machinery, (R. 65 & 66).

Q. I will ask you this question—shortly prior to January 8th, in the compressor building, in your presence and in the presence of Nick Meckem and William Holland, did you hear Holland ask whether in view of the notices that were posted their claims would be collectable, and you said, to these two men, well, the machinery is good for the labor, isn't it?

Objections.

Q. Did you make the statement?

A. I wouldn't say, but the chances are I did, because that was my belief at that time.

And further testifying, (R. 65).

Q. And you conveyed that belief to practical-

ly all of these men that were down there, at various times?

* * * * *

A. I don't know; I didn't make any special speech, I don't suppose, but I do believe that everybody thought that, understood it that way.

Q. The Court: That was your opinion?

A. That was my opinion.

Q. And you stated that opinion to the men that were down there working, did you not?

A. I believe I did, all right.

DOING BUSINESS

Assignment No. 16, relates to the finding of the Court as a fact that plaintiff was "doing business within the Territory of Alaska." Defendant's first affirmative defense alleges (R. 32) that plaintiff was a foreign corporation and that prior to the 4th day of June, 1920, had wholly failed to comply with the provisions of Chapter 23 of the Compiled Laws of Alaska, 1913, relating to foreign corporations, inasmuch, as it had failed to file copies of its articles of incorporation, certificate of its consent to be sued in the courts of the district, and the appointment of a resident agent upon whom service of process might be made.

Plaintiff replying alleges, (R. 40).

"Replying to the first affirmative defense set forth in defendant's answer plaintiff denies that at any time mentioned in its complaint it was engaged in doing a general business in the Territory of Alaska."

The pleadings impliedly admit that plaintiff was doing other than a "general business."

> Compiled Laws of Alaska, Sec. 660, provides, "If any such corporation or company shall fail to comply with any of the provisions of this chapter, all its contracts with citizens of the District shall be void as to the corporation or company, and no Court of the District, or of the United States, shall enforce the same in favor of the corporation or company so failing."

Prior to October 20th, 1917, the date of the first lease between plaintiff and J. E. Whalen and Wm. Quitch, the testimony of the latter show the following activities of plaintiff, (R. 50 & 51).

> Q. Were you one of the locators of these claims?
>
> A. No.
>
> Q. Your first interest in them was when you and Whalen took the lease from the Alaska Homestake Mining Co?

A. No. it was some time before that—I was sent down to sink a shaft. I sunk a shaft before that.

Q. You did some work for the Alaska Homestake Mining Co?

A. Yes, under the direction of Mr. Topliff.

Q. When did you go down there to work for the Alaska Homestake Mining Co.?

A. About a year before,—I don't know the date.

The lease itself shows that the mining ground at the date thereof was in a partial state of development and contains this description, in part, of the leased premises; "together with all improvements, machinery, tools, buildings and equipment upon or near said mining claims." (R. 16).

The lessee was *required* under the terms of the lease to "keep at least six men steadily at work upon said mining claims," (R. 17) and under this and other provisions of the leases the plaintiff continued to do business within the Territory of Alaska.

Assignment No. 22, that the Court erred in entering judgment against the plaintiff and in favor of the defendant, being too general, does not conform with Rule 11 of this Court requiring plaintiff to set out

particularly the error asserted and intended to be urged.

Counsel for appellee respectfully submits that the record discloses no reversible error and that the judgment of the district court of Alaska should be affirmed.

J. L. REED,
Attorney for Appellee.